PEMILIK DAN KESEMUA ORANG LAIN YANG BERKEPENTINGAN DALAM KAPAL "FORDECO NO 12" DAN "FORDECO NO 17"

v.

SHANGHAI HAI XING SHIPPING CO LTD

FEDERAL COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN CJ
MOHAMED DZAIDDIN FCJ
ZAKARIA YATIM FCJ
[CIVIL APPEAL NO: 02-16-98(S)]
4 JANUARY 2000

SHIPPING: *Action in rem - Admiralty jurisdiction - Arrest of vessel - Plaintiff serving writ in rem and warrant of arrest against two vessels owned by defendant in respect of same claim - Whether admiralty jurisdiction of High Court could be validly invoked by plaintiff - Whether proceedings thereof a nullity - Supreme Court Act 1981 (UK), ss. 20(2)(d) & (e), 21(8) - Courts of Judicature Act 1964, s. 24(b)*

CIVIL PROCEDURE: *Admiralty - Action in rem - Collisions between ships - Claim for damages - Defendant's failure to file 'preliminary act' within prescribed period - Motion for judgment in default - Whether judgment could only be given upon plaintiff satisfying court that claim is well-founded - Whether plaintif required to satisfy court that claim is well-founded only where defendant does not appear at hearing - Rules of High Court 1980, O. 70 rr. 18(3), (4), (5) - Meaning and scope - Applicability*

The appellants were the owners of the barge and the tugboat "Fordeco No. 17" and "Fordeco No. 12" respectively, whilst the respondents were the owners of the vessel "MV Xin Hua 10". While on tow by "Fordeco No. 12", "Fordeco No. 17" collided into "MV Xin Hua 10" and the respondents, in consequence, issued a *writ in rem* to recover damages against the appellants. On 24 June 1993 the respondents served the writ on "Fordeco No. 17" and "Fordeco No. 12", and subsequently, by warrant of arrest dated 22 June 1993, the respondents caused both vessels to be arrested.

The appellants entered an unconditional appearance in the action, and the respondents thereafter duly lodged their priliminary act ('PA') under O. 70 r. 17(1) Rules of the High Court 1980 ('RHC'). The appellants however did not file their PA within the prescribed time, and the respondents applied by motion to the High Court at Sandakan for judgment against the appellants under O. 70 r. 18(3) RHC.

The learned judge ruled that since the appellants had appeared at the hearing of the motion but failed to satisfactorily explain their failure to file the PA in time, the respondents were under no duty to prove that their claim was well-founded as required by rr. 18(4) & (5) of O. 70, and that being so, the respondents were *prima facie* entitled to judgment. The learned judge in the event gave judgment to the respondents without satisfying himself that the respondents' claim was well-founded.

The appellants appealed but the appeal was dismissed by the Court of Appeal. The appellants appealed further, and argued before the Federal Court, *inter alia* that: (i) by virtue of s. 24(b) of the Courts of Judicature Act 1964, the admiralty jurisdiction of the High Court of Sabah and Sarawak was governed by the UK Supreme Court Act 1981 ('the UK Act'); (ii) on the true construction of s. 21(8) of the UK Act, once a ship has been served with a writ and arrested, no other ship in the same ownership may be served with the writ and arrested for the same claim, and the High Court at Sandakan, therefore, had no admiralty jurisdiciton over the two vessels in this case; (iii) the entire proceedings before the High Court at Sandakan was a nullity; and (iv) the courts below had erred in law in the interpretation of O. 70 rr. 18(4) & (5) RHC.

The primary issues that arose were: (i) whether on the facts and in the circumstances herein the admiralty jurisdiction of the High Court in Sabah and Sarawak could be validly invoked; (ii) whether, on the hearing of the motion for judgment herein, irrespective of whether the appellants were present or not, the respondents were dutybound to satisfy the court that their claim was well founded before the court could give judgment therefor; and (iii) whether the learned trial judge had misdirected himself by not considering the respondents' PA and affidavit before giving judgment against the appellants.

Held:
Per Mohamed Dzaiddin FCJ

[1] The admiralty jurisdiction of the High Court of Sabah and Sarawak is governed by the UK Act by virtue of s. 24(b) of the Courts of Judicature Act. The claim here is based on damage done by a ship under para 2(e) of s. 20 of the UK Act. Hence, this court cannot agree with the respondents' contention that their claim comes under s. 20(2)(d) of the UK Act and that s. 21(8) thereof does not apply.

[2] On the true construction of s. 21(8) of the UK Act, the plaintiff is limited to serving the writ on any one of the defendant's ships and arresting it. It does not prevent the issue of a writ naming more than one ship or of two or more writs each naming a different ship.

Therefore, in the instant case, the respondents were prefectly in order when they issued the *writ in rem* against the owners of both vessels "Fordeco No. 12" and "Fordeco No. 17". However, they could not serve the writ on both vessels and arrest them as the service and the arrest could only be effected on one of the vessels.

[3] Since the service of the writ and warrant of arrest were executed on both vessels, the appellants ought to have applied to the court to set aside the service of the writ and warrant of arrest on one of the vessels.

[4] The contention that the entire proceedings in the High Court is a nullity for want of jurisdiction is untenable. It is a nullity only in respect of one of the vessels and therefore the service of the writ and the warrant of arrest on her should be set aside for want of jurisdiction. In the circumstances, the *writ in rem* on the vessel "Fordeco No. 12" is set aside and the warrant of arrest executed against her discharged.

[5] It is an untenable proposition that under r. 18(4) of O. 70 RHC, on the hearing of the motion for judgment in default of filing the PA within the prescribed time, the plaintiff is required to satisfy the court that his claim is well founded only where the defendant does not appear at the hearing. To so contrue para (4) is to disregard para (5) of the Rule which makes it explicit that the court may give judgment if the plaintiff satisfies the court that his claim is well founded.

[5a] On the true construction of r. 18(4) read with r. 18(5), the court cannot give judgment automatically, and it is incumbent on the plaintiff to satisfy the court that his claim is well founded whether the defendant appears or not at the hearing of the motion.

[6] The learned trial judge had applied the wrong test in holding that under r. 18(4) the respondents were *prima facie* entitled to judgment without them proving the case and satisfying the court that their claim was well-founded. The learned judge had misdirected himself by not considering the respondents' PA and the affidavit to satisfy himself that the respondents had proved their case and that the claim was well-founded before giving judgment against the appellants.

[Appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu adalah pemilik tongkang dan tongkang tunda yang masing-masing dipanggil "Fordeco. No. 17" dan "Fordeco No. 12", sementara responden adalah pemunya kapal "MV Xin Hua 10". "Fordeco No. 17" semasa ditunda oleh "Fordeco No. 12", telah berlanggar dengan "MV Xin Hua 10" dan berikutan itu responden membuat tuntutan *writ in rem* terhadap perayu bagi mendapatkan gantirugi. Pada 24 Jun 1993 responden menyerahkan writ ke atas "Fordeco. No.17" dan "Fordeco. No.12", dan selepas itu, melalui waran tahan bertarikh 22 Jun 1993, responden menahan kedua-dua tongkang perayu.

Perayu memasukkan kehadiran tanpa syarat di dalam tindakan, dan berikut itu responden memasukkan 'preliminary act' mereka ('PA') seperti yang dikehendaki oleh A. 70 k. 17(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Perayu bagaimana pun gagal memasukkan PA mereka dalam tempoh yang ditetapkan, dan responden memohon melalui usul kepada Mahkamah Tinggi di Sandakan untuk suatu penghakiman di bawah A. 70 k. 18(3) KMT.

Hakim bijaksana memutuskan bahawa oleh kerana perayu hadir pada pendengaran usul tetapi gagal memberikan sebab yang memuaskan kenapa mereka gagal memfailkan PA dalam tempoh yang ditetapkan, maka responden tidak perlu membuktikan bahawa tuntutan mereka mempunyai asas kukuh seperti yang dikehendaki oleh kk. 18(4) & (5) A. 70, dan dengan sebab itu, responden secara *prima facie*nya berhak kepada penghakiman. Hakim bijaksana, dengan yang demikian, memberi penghakiman kepada responden tanpa memuaskan hatinya bahawa tuntutan responden mempunyai asas kukuh.

Perayu merayu tetapi rayuan mereka ditolak oleh Mahkamah Rayuan. Perayu merayu lagi, dan berhujah di hadapan Mahkamah Persekutuan, antara lain, bahawa: (i) bersebabkan s. 24(b) Akta Mahkamah Kehakiman 1964, bidangkuasa admiralti Mahkamah Tinggi Sabah dan Sarawak adalah dikawalselia oleh Akta Mahkamah Agung 1981 (UK) ('Akta UK'); (ii) atas pengertian sebenar s. 21(8) Akta UK, sebaik sahaja sebuah kapal itu diserahkan dengan writ dan ditahan, tiada kapal lain dalam pemunyaan yang sama boleh diserahkan dengan writ dan ditahan untuk tuntutan yang sama, dan Mahkamah Tinggi di Sandakan, dengan sebab itu, tidak ada bidang kuasa admiralti terhadap kedua-dua tongkang dalam kes ini; (iii) keseluruhan prosiding di hadapan Mahkamah Tinggi Sandakan adalah batal; dan (iv) mahkamah-mahkamah di bawah telah khilaf di sisi undang-undang dalam mentafsir A. 70 kk. 18(4) & (5) KMT.

Isu-isu utama yang berbangkit ialah: (i) samada berdasarkan fakta dan halkeadaan di sini, bidang kuasa admiralti Mahkamah Tinggi Sabah dan Sarawak boleh digunapakai dengan sahnya; (ii) samada, ekoran pendengaran usul untuk penghakiman di sini, dan tanpa mengira samada perayu hadir ataupun tidak, responden mesti membuktikan bahawa tuntutan mereka mempunyai asas kukuh sebelum penghakiman berkaitannya boleh dibuat; dan (iii) samada hakim bicara bijaksana telah melakukan salah arahan kerana tidak memberi pertimbangan kepada PA dan afidavit responden sebelum memberi penghakiman.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Bidang kuasa admiralti Mahkamah Tinggi Sabah dan Sarawak adalah dikawalselia oleh Akta UK dengan kerana s. 24(b) Akta Mahkamah Kehakiman 1964. Tuntutan di sini adalah didasarkan kepada kerosakan kepada kapal di bawah perenggan 2(e) s. 20 Akta UK. Dengan itu, mahkamah tidak bersetuju dengan pengataan responden bahawa tuntutan mereka berada di bawah s. 20(2)(d) Akta UK dan bahawa s. 21(8) Akta itu tidak berkaitan.

[2] Atas pentafsiran sebenar s. 21(8) Akta UK, seseorang defendan hanya boleh menyampaikan writ kepada, dan menahan hanya sebuah daripada kapal-kapal defendan. Ia tidak menyekat pengeluaran writ yang menamakan sebuah atau dua buah kapal ataupun pengeluaran lebih banyak writ dengan masing-masing menamakan kapal yang berbeza. Oleh itu, dalam kes semasa, tiada cacat celanya bagi responden untuk mengeluarkan *writ in rem* terhadap kedua-dua tongkang "Fordeco No. 12" dan "Fordeco No. 17". Bagaimanapun, mereka tidak boleh menyerahkan writ ke atas kedua-dua tongkang tersebut dan menahannya, oleh kerana penyerahan dan penahanan hanya boleh dilaksanakan terhadap hanya salah satu daripada tongkang-tongkang tersebut.

[3] Oleh kerana penyerahan writ dan waran tahan dibuat terhadap kedua-dua tongkang, perayu sepatutnya memohon kepada mahkamah untuk mengenepikan penyerahan writ dan waran tahan terhadap salah satu dari tongkang-tongkang tersebut.

[4] Hujah bahawa keseluruhan prosiding di Mahkamah Tinggi adalah batal kerana tiada bidang kuasa tidak dapat dipertahankan. Yang batal hanyalah yang berhubung dengan salah satu dari tongkang-tongkang tersebut, dan dengan itu penyerahan writ and waran tahan terhadapnya harus diketepikan. Dengan hal yang demikian, *writ in rem* terhadap tongkang "Fordeco No. 12" adalah diketepikan dan waran tahan yang dilaksanakan terhadapnya dilepaskan.

[5] Ianya bukanlah satu proposisi yang betul bahawa di bawah perenggan k. 18(4) A. 70 KMT, pada pendengaran usul untuk penghakiman kerana ingkar memfail PA dalam tempoh yang ditetapkan, plaintif dikehendaki memuaskan mahkamah bahawa tuntutannya mempunyai asas kukuh hanya jika defendan tidak hadir di pendengaran tersebut. Mentafsir peranggan (4) sedemikian rupa adalah mengketepikan perenggan (5) yang memperuntukkan dengan jelas bahawa mahkamah boleh memberi penghakiman jika plaintif memuaskan mahkamah bahawa tuntutannya mempunyai asas kukuh.

[5a] Atas pentafsiran sebenar k. 18(4) dibaca dengan k. 18(5) A. 70 KMT, mahkamah tidak boleh memberi penghakiman secara automatik dan ianya menjadi kewajipan plaintif untuk memuaskan mahkamah bahawa tuntutannya mempunyai asas kukuh samada defendan hadir atau tidak sewaktu pendengaran usul.

[6] Hakim bicara bijaksana telah menggunapakai ujian yang salah apabila merumuskan bahawa di bawah k. 18(4) responden adalah *prima facie* berhak kepada penghakiman tanpa mereka membuktikan kes mereka dan memuaskan mahkamah bahawa tuntutan mereka mempunyai asas kukuh. Hakim bijaksana telah tersalah arah akan dirinya kerana gagal menimbang PA dan afidavit responden bagi memuaskan hatinya bahawa responden telah membuktikan tuntutan mereka dan bahawa tuntutan tersebut mempunyai asas kukuh sebelum memberi penghakiman.

[Rayuan dibenarkan; perintah sekadarnya.]

Case(s) referred to:

"Brunei 602", Owners of Cargo Aboard MV v. MV "Hai Hin" Owners of & Anor [1984] 1 MLJ 227 ***(refd)***
Neo Chan Eng v. Koh Yong Hoe [1960] 26 MLJ 291 ***(refd)***
The Aristone [1908] ***(refd)***
The Avro International [1988] 1 MLJ 147 ***(refd)***
The Banco [1971] 1 Lloyd's LR 49 ***(refd)***
The Damavand [1993] 2 SLR 717 ***(refd)***
The Eschersheim [1976] 2 Lloyd's LR 1 ***(refd)***
The Freccia Del Nord [1989] 1 Lloyds LR 388 ***(refd)***
The Ohm Mariana [1993] 2 SLR 698 ***(refd)***
The Stephen J [1985] 2 Lloyd's LR 344 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 24(b)
Evidence Act 1950, s. 101
Rules of the High Court 1980, O. 70 rr. 17(1), (3), 18(3), (4), (5), 20(3), (4), (7)
Administration of Justice Act 1956, s. 3(4)
Supreme Court Act 1981 [UK], ss. 20(2), (d), (e), 21(8), 22, 23

Other source(s) referred to:
Bullen & Leake & Jacob's on Precedents of Pleadings, 13th edn, 1990, p 678
Halsbury Statute, 4th edn, vol 1, 1998 reissue
The Oxford Concise Dictionary, 9th edn
The Supreme Court Practice, 1997, para 75/18/1, p 1370

For the appellants - Simon KY Shim; M/s Shim Pang & Co
For the respondents - David Wong (Francis Wong with him); M/s Peter Lo & Co

[Appeal from Court of Appeal, Kota Kinabalu; Civil Appeal No: S-02-211-1994]

Reported by WA Sharif

JUDGMENT

Mohamed Dzaiddin FCJ:

On 19 June 1993, the respondents, who are the plaintiffs in the admiralty suit commenced an action *in rem* in the High Court Sandakan against the appellants/defendants being owners of two vessels for loss and damage to their ship or vessel "MV Xin Hua 10" of the Port of Shanghai while at anchorage within an area of the allocated wharf in Sandakan when it was collided into by the appellants' barge "Fordeco No. 17" which was being towed by their tugboat "Fordeco No. 12". By an indorsement on the writ, the respondents claimed that the loss and damage to their vessel was due to the negligence of the appellants, their servants or agents. On 24 June 1993, the respondents served the writ of summons in action *in rem* on the appellants' tugboat "Fordeco No. 12" and barge "Fordeco No. 17". Consequently, both vessels were arrested pursuant to a warrant of arrest dated 22 June 1993. On 13 July 1993, the appellants entered an unconditional appearance in the action by their solicitors, Messrs. Shim Pang & Co. A month later on 13 August 1993, the respondents lodged their Preliminary Act (PA) in compliance with O. 70 r. 17(1) of the Rules of the High Court 1980 (RHC) which, *inter alia*, states:

> (1) In an action to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships, unless the court otherwise orders, the plaintiff must, within 2 months after issue of the writ, and the defendant must, within 2 months after entering an appearance in the action, and before any pleading is served lodge in the Registry a document (in these rules referred to as a "preliminary act") containing a statement of the following particulars:

It is common ground that the appellants failed to file their PA within two months after entering an appearance in the action. After an exchange of correspondence between solicitors, the appellants finally lodged their PA on 20 September 1993, seven days after the prescribed period of two months from date of entry of appearance.

Proceedings In The High Court

On 21 September 1993, the respondents applied to the High Court Sandakan by motion for judgment (in default) against the appellants for failure to lodge the PA within the prescribed period under O. 70 r. 18(3) RHC. Rule 18(3) states:

> (3) Where in such an action, being an action *in rem*, a defendant fails to lodge a preliminary act within the prescribed period, the plaintiff, if he has lodged such an act, may apply to the court by motion for judgment against that defendant, and it shall not be necessary for the plaintiff to file or serve a statement of claim or an affidavit before the hearing of the motion.

The notice of motion was supported by an affidavit of Mr. Alexander Khoo Kay Mian, the respondents' advocate affirmed on 21 September 1993, who deposed in paras. 11 and 12 to the following effect:

> 11. By virtue of Order 70 Rule 18(3) of the Rules of the High Court, 1980 the Plaintiffs are entitled to apply to this Honourable Court by motion for judgment against the Defendants who have failed to lodge a Preliminary Act within the prescribed period under Order 70 Rule 17(1).
>
> 12. I verily believe that the Plaintiffs' claim is well founded. As such, by virtue of Order 70 Rule 18(5) of the Rules of the High Court, 1980 the Plaintiffs are entitled to apply to this Honourable Court by motion for an Order that the Defendants' tugboat "Fordeco No. 12" and scow "Fordeco No. 17" now under arrest as aforesaid be appraised and sold and that the judgment sum together with interest and costs of this action be paid out of the proceeds of the sale thereof.

The appellants by their advocate, Mr. Simon Shim Kong Yip affirmed an affidavit in reply on 14 October 1993 opposing the motion for default judgment. He deposed that Mr. Khoo's affidavit did not show that his client's claim was well founded in compliance with O. 70 r. 18(4) RHC. In addition, Mr. Shim stated that the appellants were late in filing their PA because of the refusal of the respondents' solicitors to supply relevant documents pertaining to the alleged collision; the difficulty for the adjustors/surveyors to obtain evidence and to submit their reports to enable the appellants' solicitors to prepare the PA; the respondents' refusal to grant an extension of time.

The notice of motion for judgment was heard by the learned judge on 15 October 1993. On 5 September 1994 his Lordship gave judgment for the respondents and ordered damages to be assessed and costs.

In his grounds of judgment (Rekod Rayuan pp. 8-9), his Lordship stated as follows:

> The question which I have now to consider is whether in the circumstances of this case the court should give judgment against the defendants in default of lodging a preliminary act within the prescribed period. The relevant rule on this point is to be found in Order 70, rule 18(4) and (5) which read as follows:
>
> > (4) On the hearing of a motion under paragraph (3) the court may make such order as it thinks just, and where the defendant does not appear on the hearing and the court is of the opinion that judgment should be given for the plaintiff provided he proves his case, it shall order the plaintiff's preliminary act to be opened and require the plaintiff to satisfy the court that his claim is well founded.
> >
> > The plaintiff's evidence may, unless the court otherwise order, be given by affidavit without any order or direction in that behalf.
> >
> > (5) Where the plaintiff in accordance with a requirement under paragraph (4) satisfies that his claim is well founded, the court may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action is brought to be appraised and sold and the proceeds to be paid into court or make such order as it think just.
>
> Learned counsel for the defendants contends to the effect that it is a prerequisite under the rule that the plaintiffs must satisfy the court that their claim is well founded in order to succeed in their application. Under this contention, he submits that paragraph 2 of Mr. Khoo's affidavit is an assertion and ought to be struck out for non-disclosure of the source of information or belief. The implication seems to be that without this paragraph, there is nothing in the affidavit to prove that the plaintiffs' claim is well founded to entitle the court to give judgment against the defendants ... Be that as it may, it appears implicit in the above-quoted rule that where the defendant appears on the hearing of the motion, the requirement of proof that the claim is well founded does not apply, and I am of the view that in such a case the plaintiff is *prima facie* entitled to judgment unless the defendant gives a satisfactory explanation why he did not lodge the preliminary act within the prescribed period.

On 8 November 1994, the appellants appealed to the Court of Appeal.

Proceedings In The Court of Appeal

We note from the appeal record that two principal grounds were canvassed before the Court of Appeal, one of which concerned the admiralty jurisdiction of the High Court of Sabah and Sarawak under s. 21(8) of the U.K. Supreme Court Act 1981 read with s. 24(b) of the Courts of Judicature Act 1964. The Court of Appeal did not appear to consider this jurisdictional point. The second

ground was on the finding of the learned High Court judge which was founded on O. 70 r. 18(4) RHC. In dismissing the appellant's appeal, the Court of Appeal agreed with the reasons of the learned judge and held that on the proper construction of O. 70 r. 18(4) RHC and in the circumstances of the case where the appellants appeared at the hearing of the motion, the respondents need not prove that their claim was well founded and they were *prima facie* entitled to be given judgment unless the appellants could give a satisfactory explanation for their failure to file their PA within time.

Dato' Ahmad Fairuz HMR, delivering the judgment of the court, stated as follows (p. 15 Rekod Rayuan):

> The reading of both rules 18(3) and 18(4) shows that the court when hearing the Respondents motion "can make any order as it deems fair". After these wordings there were arguments flooded with clarity in its meaning. Therefore the clarity itself strengthen the appropriateness of the decision of the Learned Trial Judge – no need for the Respondents to prove that their claim is well founded. There is no ambiguity in rule 18(4). Thus we agreed with the Learned Trial Judge that the Respondents need not, in the circumstances that appears before the Learned Judge as he then was, to prove that their claim is well founded. In the circumstances, the Appellants' argument about the need of the court to open the preliminary act of the Respondents became weak for want of merit. In fact, we concur with the Learned Judge when he said that the Respondents were *prima facie* entitled to be given judgment unless the Appellants could give a satisfactory explanation as to why they did not lodge their preliminary act within the prescribed time period. And the Appellant did give the explanation. And the explanation were taken into account by the Learned Trial Judge. The Judgment of the Learned Trial Judge summarised the explanation. According to the summary, the refusal or failure of the Respondents to put forward the documents requested by the Appellants was one of the reasons that caused the delay in lodging the Appellants Preliminary Act. This, according to the Learned Trial Judge, was not a valid reason for this delay. The correctness of the Learned Trial Judge's opinion will be more obvious if rules 17(1)(i) to (xv), the Rules of the High Court 1980 were to scrutinized (sic). It is clear from the provision that the purpose of the preliminary action is as mentioned in the judgment of the Learned Trial Judge, to obtain evidence from the related parties about "*recenti facto*" situation and to avoid the defendant (the Appellants in this appeal) from designing their case against the Plaintiff (the Respondents in this appeal) case. As such, the refusal of the Respondents to put forward the documents cannot be made a ground to file their preliminary action late.

Appeal To This Court

There are two questions of law, upon which leave to appeal was granted, for the determination of this court. The questions may be stated as follows:

(1) whether the admiralty jurisdiction of the High Court in Malaya and Sabah and Sarawak can be validly invoked when the plaintiff had issued and served a Writ in Rem and Warrant of Arrest against two vessels owned by a defendant in respect of the same claim.

(2) whether on the hearing of a motion for judgment against a defendant for failure to lodge a Preliminary act (PA) under Order 70 r. 18(3) RHC and the defendant appears, the plaintiff is required to satisfy the court that his claim is well founded before the court gives judgment for the claim.

We heard the appeal on 14 June 1999 at Kota Kinabalu and adjourned our decision to enable counsel to submit further written submissions. On 27 July 1999 we delivered an oral judgment allowing the appeal with costs here and below, and the deposit to be refunded to the appellants. We set aside the Order of the High Court dated 5 September 1994 and remitted the matter to the High Court Sandakan for full hearing and ordered that the parties be at liberty to apply to the said court for further directions to comply with the provisions of O. 70 RHC. In addition, in view of our finding on question (1), we hereby make a further order that the writ in rem and warrant of arrest executed on the appellants' second vessel "Fordeco No. 12" be set aside.

We now give our reasons for allowing the appeal.

On the jurisdiction point, the question for our decision is whether the admiralty jurisdiction of the High Court of Sabah and Sarawak can be validly invoked where the plaintiffs had issued and served a writ *in rem* and a warrant of arrest against vessels which are owned by the defendants in respect of the same claim.

Short of repeating, the facts are quite straightforward. On 18 June 1993, the respondents/plaintiffs issued a writ in rem against the appellants/defendants being owners of two vessels, namely, "Fordeco No. 12" and "Fordeco No. 17". The writ was indorsed with a claim to recover loss and damages from the defendants by reason of the collision of the plaintiffs' vessel with "Fordeco No. 17" which was towed by "Fordeco No. 12". The writ was then served on both vessels on 24 June 1993. By warrant of arrest dated 22 June 1993, the plaintiffs caused both vessels to be arrested.

Submissions

Mr. Simon Shim, counsel for the appellants, first submitted that the U.K. Supreme Court Act 1981 (the U.K. Act) applies to our High Court under s. 24(b) of the Courts of Judicature Act 1964 which states:

> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;

Section 21(8) of the U.K. Act provides:

> Where, as regards any such claim as is mentioned in section 20(2)(e) to (r), a ship has been served with a writ or arrested in an action *in rem* brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action *in rem* brought to enforce that claim; but this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship.

Secondly, on the true construction of s. 21(8) above, once a ship has been served with a writ and arrested, no other ship in the same ownership may be served with the writ and arrested for the same claim. For the above proposition, counsel relied on two authorities. First, in *The Banco* [1971] 1 Lloyd's LR 49, the plaintiffs issued a writ *in rem* against the defendants and arrested seven vessels owned by the defendants including the Banco. The defendants contended that under the Administration of Justice Act 1956, s. 3(4), the plaintiffs only had the right to arrest the Banco or any one other vessel in the same ownership. It is to be noted that ss. 20-23 of the U.K. Act substantially derived from the Administration of Justice Act 1956, Pt I which has been repealed. Lane J held that accordingly, referring to the 1952 Maritime Convention, s. 3(4) meant that the plaintiffs might arrest one ship of the defendants only, which might be the offending ship or alternatively, any other ship in like ownership. On appeal by the plaintiffs, the Court of Appeal, held that the meaning of s. 3(4) was not ambiguous and the defendants' construction of that section was correct. It held, per Lord Denning, MR, (p. 53) (Cairns LJ, dissenting):

> When a plaintiff brings an action *in rem*, the jurisdiction is invoked, not when the writ is issued, but when it is served on the ship and the warrant of arrest is executed. The reason is because it is an action *in rem* against the very thing itself: and does not take effect until the thing is arrested. This means that the practice is right. The plaintiff is entitled, as soon as his cause of action arises, to issue his writ *in rem* against the offending ship and all other ships which at that time, that is, at the date of issue of the writ, belong to the same owner.

> That saves his time. Then he can wait until he finds the one ship which he thinks most suitable to arrest. Then he will serve her and execute a warrant of arrest against her. That having been done, he cannot go against the other ships and should strike them out of the writ.
>
> In my opinion, therefore, the Judge was right in setting aside the service of the writ and warrant of arrest on all the vessels save the Banco.

In *The "Stephen J"* [1985] 2 Lloyd's LR 344, s. 21(8) of the U.K. Act was considered. The issue before the QBD court was whether the plaintiffs were entitled to arrest Stephen J if and when she came within the jurisdiction of the court. Sheen J stated as follows (p. 346):

> Sub-section 8 of s. 21 of the Act was introduced to deal with the question raised in *The Banco* [1971] 1 Lloyd's Rep. 49; [1971] P. 137. The purpose of sub-s. 8 of s. 21 is to make it quite clear that the plaintiff whose claim is within that part of the jurisdiction of the High Court which can be invoked by an action *in rem*, can arrest only one ship, either the offending ship or another ship in the same ownership, in accordance with the International Convention Relating to the Arrest of Seagoing Ships which was signed in Brussels in 1952, while at the same time preserving the practice, which started in 1956, of naming more than one ship on the writ, and then deleting all but one when the time came to serve the writ and arrest a ship. In my judgment sub-s. 8 of s. 21 cannot be interpreted in isolation. It must be interpreted in conjunction with sub-s. 4 of the same section.

Counsel also referred us to (1) *The Freccia Del Nord* [1989] 1 Lloyds L.R. 388 and (2) *The Damavand* [1993] 2 SLR 717.

Therefore, based on the above authorities, counsel contended that the High Court Sandakan had jurisdiction only in respect of one vessel belonging to the appellants.

Thirdly, having issued a writ *in rem* against both vessels and warrant of arrest executed on them, the entire proceedings in the High Court of Sandakan became a nullity because its jurisdiction was invoked in excess of its powers conferred by statute. In addition, being a nullity, it could not be cured by an entry of unconditional appearance by the appellants, nor a waiver of a right to set aside the writ and warrant of arrest and any judgment made in pursuance of a null proceedings must be set aside *ex debito justicae*. Counsel relied on *The Avro International* [1988] 1 MLJ 147 at 150 and *The Ohm Mariana* [1993] 2 SLR 698.

Mr. D.W. Wong, for the respondents, in response to Mr. Shim's written submission contended that there was no breach of s. 21(8) of the U.K. Act because the respondents' claim came under s. 20(2)(d) for damage **received** by a ship, whereas s. 21(8) was concerned with claims under s. 20(2)(e) to (r). In the instant case, the respondents relied on s. 20(2)(e), ie, "any claim for damage **done** by a ship". In our view, looking at the indorsement of the writ, it seems clear that the plaintiffs' claim is for loss and damage to their ship by reason of being collided by the defendants' barge which was being towed by their tugboat. Although the damage was received by the plaintiffs' ship, the claim is based on damage done by a ship under para. (2)(e). In *Halsbury Statute*, 4th edn. vol. 1, 1998 Reissue, the notes on s. 20 of the U.K. Act at p. 15 says that damage received by a ship under para. (2)(d) covers the case where damage is caused by a fixed object, such as a pierhead. Where the damage is caused by another ship, claims within this paragraph will often also fall within para. (2)(e). See also *The "Eschersheim"* [1976] 2 Lloyd's LR 1. Hence, we cannot agree with Mr. Wong's contention that the respondent's claim comes under s. 20(2)(d) and that s. 21(8) does not apply.

Conclusion On Question (1)

The admiralty jurisdiction of the High Court of Sabah and Sarawak is governed by the U.K. Supreme Court Act 1981 by virtue of s. 24(b) of the Courts of Judicature Act 1964. Based on the authorities discussed above, it is settled law that when a plaintiff brings an action *in rem*, the jurisdiction of the High Court is invoked, not when it is issued, but when it is served and warrant of arrest executed. The issue of the writ may be the start of the invocation of the jurisdiction, but the invocation is not complete until the writ is served or deemed to have been served as a result of the entry of appearance by the defendant before service is effected (See: *The Banco, supra,* p. 57). When a plaintiff brings an action *in rem* against more than one ship belonging to the defendant, the jurisdiction is invoked when the writ is served and the warrant of arrest executed on one of the named ships. Therefore, on the true construction of s. 21(8) of the U.K. Act, the plaintiff is limited to serving the writ on any one of the defendant's ships and arresting it. It does not prevent the issue of a writ naming more than one ship or of two or more writs each naming a different ship.

Therefore, in the instant case, we are of the view that the respondents/plaintiffs were perfectly in order when they issued the writ *in rem* against the owners of both vessels "Fordeco No. 12" and "Fordeco No. 17". However, they could not serve the writ on both vessels and arrest them as the service and the arrest could only be effected on one of the vessels, the offending vessel. They are entitled to proceed against either one of the vessels. It is noted that the practice in the U.K. Admiralty Court since 1956 was to name more than one ship on

the writ and then deleting all but one when the time came to serve the writ and arrest a ship. (The *"Stephens J"*, *supra*). Therefore, since service of the writ and warrant of arrest were executed on both vessels, the appellants ought to have applied to the court to set aside the service of the writ and warrant of arrest on one of the vessels. Instead, by their solicitors, they entered an unconditional appearance and now arguing before us that the writ *in rem* and warrant of arrest were null and void for want of jurisdiction of the High Court. We reject the contention of learned counsel that the entire proceedings is a nullity for want of jurisdiction. In our view, it is a nullity only in respect of one of the vessels and therefore the service of the writ and the warrant of arrest on her should be set aside for want of jurisdiction. The decision of Lane J in *The Banco* [1970] 2 Lloyd's Rep. 230 which was affirmed by the Court of Appeal, *supra*, is of much help. On 26 July 1970, the plaintiffs' motor vessel Monte Ulia collided with a jetty in the River Thames causing extensive damage. The plaintiffs alleged that that collision was caused by the negligent navigation or management of the defendants' motor tanker *Banco*. The plaintiffs issued a writ *in rem* against the defendants and arrested seven vessels owned by the defendants including the *Banco*. The defendants contended that under the Administration of Justice Act 1956, s. 3(4), the plaintiffs only had the right to arrest the *Banco* or any one other vessel in the same ownership. Her Ladyship held that accordingly, referring to the 1952 Maritime Convention, s. 3(4) of the Administration of Justice Act meant that the plaintiffs might arrest one ship of the defendants only, which might be the offending ship or alternatively, any other ship in like ownership. Accordingly, she held that the plaintiffs were limited to arresting one of the defendants' ships. She then made an order setting aside the service of the writ and warrant of arrest on the six vessels save the *Banco* for want of jurisdiction and directing that the six ships be released from arrest forthwith. See also: *"Brunei 602", Owners of Cargo Aboard MV v. MV "Hai Hin" Owners of & Anor* [1984] 1 MLJ 227 CA Singapore.

In the light of our above finding, we make an order setting aside the service of the writ *in rem* on the vessel "Fordeco No. 12" and discharging the warrant of arrest executed against her. This means the action against the offending vessel "Fordeco No. 17" should proceed.

Turning to Question (2) on the interpretation of O. 70 r. 18(4), the following sub-rules are material:

> 18(3) Where in such an action, being an action *in rem*, a defendant fails to lodge a preliminary act within the prescribed period, the plaintiff, if he has lodged such an act, may apply to the court by motion for judgment against that defendant, and it shall not be necessary for the plaintiff to file or serve a statement of claim or an affidavit before the hearing of the motion.

(4) On the hearing of a motion under paragraph (3) the court may make such order as it thinks just, and where the defendant does not appear on the hearing and the court is of opinion that judgment should be given for the plaintiff provided he proves his case, it shall order the plaintiffs preliminary act to be opened and require the plaintiff to satisfy the court that his claim is well founded.

The plaintiff's evidence may, unless the court otherwise orders, be given by affidavit without any order or direction in that behalf.

(5) Where the plaintiff in accordance with a requirement under paragraph (4) satisfies the court that his claim is well founded, the court may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action is brought to be appraised and sold and the proceeds to be paid into court or make such order as it thinks just.

Rule 18 deals with a procedure for obtaining judgment against a party in default of lodging a PA within the prescribed period. In an action *in rem* for damages occasioned by collisions between ships, a PA containing statements of fact must be filed by both parties. Under para. (3) of r. 18 where a defendant fails to lodge the PA within the prescribed period, the plaintiff, if he has lodged his PA, may apply to the court by motion for judgment against the defendant. The plaintiff need not file or serve a statement of claim or an affidavit before the hearing of the motion. By para. (4), on the hearing of the motion for judgment the court may make such order as it thinks just. Where the defendant does not appear and the court is of opinion that judgment should be given for the plaintiff provided he proves his case, the court shall order the plaintiff's PA to be opened and require him to satisfy the court that his claim is well founded, which unless the court otherwise orders, he may rely on affidavit evidence.

It will be recalled that the learned High Court judge arrived at his finding based on the appearance of the appellants by counsel, at the hearing of the motion. His Lordship held that it was implicit in r. 18(4) and (5) that where the appellants appeared, the requirement of proof that the respondent's claim was well founded did not apply, and they were *prima facie* entitled to judgment unless the appellants gave a satisfactory explanation why they did not lodge the PA within the prescribed period. The Court of Appeal affirmed the High Court decision and categorically stated that there was no ambiguity in r. 18(4).

Submissions

Learned counsel for the appellants submitted that the courts below erred in law in the interpretation of O. 70 r. 18(4) and (5). He stated that the learned High Court judge was wrong in holding that the plaintiffs requirement of proof that his claim was well founded did not apply where the defendant appeared on the hearing of the motion and the plaintiff was *prima facie* entitled to judgment unless the defendant gave a satisfactory explanation why he did not lodge the PA within the prescribed period. Counsel contended that the words in r. 18(4): "and where the defendant does not appear on the hearing and the court is of opinion that judgment should be given for the plaintiff provided he proves his case ..." should be read disjunctively and could not be read to provide that only where the defendant did not appear that the plaintiff would have to prove his case. He stated that under the rule, even where the defendant did not appear, and the court was minded to grant judgment in default as a result of his non-attendance, the court could only grant judgment provided the plaintiff proved his case. According to counsel, this construction is borne out by r. 18(5) which provides that where the plaintiff in accordance with the requirement of para. (4) satisfies the court that his claim is well founded, the court may grant judgment. Counsel submitted that prior to judgment the court must be satisfied that the plaintiff's claim was well founded whether the defendant appeared or not at the hearing of the motion.

In the light of the above submission, Mr. Shim contended that the learned judge misdirected himself when he failed to apply his mind properly to the question whether the respondents had satisfied the court that their claim was well founded.

The response of counsel for the respondents did not assist us at all. He replied that the burden was on the appellants to satisfy the court why judgment should not be granted and to show merits in their case, if any, which they failed to do so.

The question for our determination is whether it is implicit in r. 18(4) and (5) of O. 70 that where a defendant appears on the hearing of a motion for judgment the plaintiff is not required to satisfy the court that his claim is well founded before judgment for the claim is given but is *prima facie* entitled to judgment unless the defendant gives a satisfactory explanation why he failed to file the PA within the prescribed period.

In our view, on the true construction of r. 18(4) and (5), it is incumbent on the plaintiff to satisfy the court that his claim is well-founded before the court can give judgment on the claim. It is an untenable proposition that under para. (4) where on the hearing of the motion for judgment in default of filing the

PA within the prescribed period, the plaintiff is required to satisfy the court that his claim is well-founded only where the defendant does not appear at the hearing. In our view, the effect of para. (4) is that where the defendant does not appear, the court cannot give judgment automatically because under para. (5) the court may only give judgment for the claim where the plaintiff in accordance with the requirement under para. (4) satisfies the court that his claim is well founded. Thus, where the defendant does not appear on the hearing, and the court is of opinion that judgment should be given for the plaintiff provided he proves his case, the court shall order the plaintiff's PA to be opened and require the plaintiff to satisfy the court that his claim is well founded. In another word, the court may give judgment upon the plaintiff satisfying the court that his claim is well founded. To construe the paragraph as was done by the learned judge means to disregard para. (5) which is explicit that the court may give judgment if the plaintiff satisfies the court that his claim is well-founded. The dictionary meaning of "well-founded" is "based on good evidence; having a foundation in fact or reason." (*The Oxford Concise Dictionary*, 9th edn). Moreover, in our adversarial system of achieving justice, and as a matter of law and pleadings, the burden of proof lies on the party who substantially asserts the affirmative of the issue (s. 101 Evidence Act). Hence it is for the plaintiff to prove his case and satisfy the court that his claim is well-founded before the court grants him judgment on the claim whether or not the defendant appears at the hearing of the application.

There are other considerations why we come to the above conclusion. First, the plaintiffs' claim in the instant case is for damages for negligence as a result of collision between a ship and a tugboat. What is the right of action here? An action lies whenever the plaintiff has suffered damage by reason of the negligent performance of any duty which the defendant, his agent or servant owes to the plaintiff. There are three elements that together constitute the right of action for negligence, namely, duty, breach and damage. (*Bullen & Leake & Jacob's on Precedents of Pleadings*, 13th edn. (1990) at p. 678). Hence, the burden is on the plaintiff to prove these elements. It is settled law that the onus of proving negligence is on the plaintiff (*Neo Chan Eng v. Koh Yong Hoe* [1960] 26 MLJ 291). Thus applying this principle of law to the instant case, it is for the respondents to satisfy the court that their claim is well-founded.

Secondly, looking at r. 18 it is clear the rule confers on the court an unfettered discretion which must be exercised judicially. It may dismiss a claim or make such other order as it thinks just or grant a judgment upon the motion. It may also, on such terms as it thinks just, set aside any judgment entered under this rule. Therefore, in exercising the discretion to grant judgment under r. 18(5), regard must be had to the plaintiff satisfying the court that his claim is well-founded.

Thirdly, r. 20(3) and (4) of O. 70 in the context of default judgment would provide a guide in interpreting r. 18(4). Where a defendant fails to enter an appearance (r. 20(3)) or fails to serve a defence (r. 20(4)) within the time limited under these rules, the plaintiff upon filing an affidavit proving service of the writ and upon filing an affidavit verifying the facts on which the action is based, and in the case of the defence, an affidavit that no defence was filed and served, may apply to the court for judgment by default. Under r. 20(7), the court if satisfied that the applicant's claim is well-founded may give judgment. It does seem odd that under r. 20(3) and (4) the plaintiff has to prove his case by an affidavit verifying the facts on which the action is based, but if the default is in filing the PA under r. 18(4), as found by the learned judge, the plaintiff is not required to prove his case at all but is *prima facie* entitled to judgment unless the defendant satisfies the court why he failed to file the PA within time. It will be noted that in these cases, the defendant does not appear, yet the burden is different between an application under r. 18 and r. 20. In this regard, we agree with Mr. Shim's submission that the learned judge applied the wrong test in holding that under r. 18(4) the respondents were *prima facie* entitled to judgment without them proving the case and satisfying the court that their claim was well-founded.

Conclusion On Question (2)

For the above reasons, we would answer the second question posed in the appeal as follows. Where in an action *in rem*, a defendant fails to file his PA within the prescribed period and the plaintiff applies for judgment in default against the defendant:

(1) If the defendant does not appear, the plaintiff must prove his case and the court shall order his PA to be opened and require him also to satisfy the court that his claim is well-founded. The plaintiff may rely on his affidavit.

(2) If the defendant appears at the hearing, the plaintiff must still satisfy the court that his claim is well-founded either by ordering the opening of his PA or by considering his affidavit before the court grants judgment under paragraph (5) of r. 18.

We pause to stress here the importance of the PA. (See the observations of Lord Alvestone CJ in *The Aristone* [1908] p. 9 at 19). A PA is a written statement containing the particulars required under items (i) to (xv) of r. 17(1). These particulars relate to the vessels involved in the collision. "The object of the PA is to obtain from the parties statements of the fact at the time when they are fresh in their recollection. The other main purpose is to force the parties to "plead blind". A statement of fact in a PA is a formal admission

binding the party making it, and can only be departed from by "special leave". Compliance with the filing of the PA may enable the court under r. 17(3) to order the trial of the action without pleadings. (*The Supreme Court Practice* 1997 1 para 75/18/1 p. 1370).

From the grounds of judgment of the learned High Court judge, it is clear to us that his Lordship did not order the respondents to open their PA to ascertain the facts of the collision. The only evidence before the court was the affidavit filed on behalf of the respondents, as applicants to the motion for judgment. Mr. Alexander Khoo deposed in his affidavit dated 21 September 1993 that this was an action *in rem* to enforce a claim for loss and damage suffered by the respondents' vessel arising out of the collision with the appellants' vessels. He did not set out the circumstances which led to the said collision, but merely stated that he verily believed that the respondents' claim was well founded and by virtue of r. 18(5) they were entitled to apply for judgment and arrest of the appellants' vessels.

In the circumstances of the case, we find that the learned judge had misdirected himself by not considering the respondents' PA and the affidavit to satisfy himself that the respondents had proved their case and that the claim was well-founded before giving judgment against the appellants.

The Result

For the reasons stated above, we confirm our oral decision made earlier and hereby make the following orders:

1. The appeal is allowed with costs here and below.
2. The Order of the High Court Sandakan dated 5 September is set aside.
3. The service of the writ and warrant of arrest on the vessel "Fordeco No. 12" is set aside and be released from arrest forthwith.
4. The case is remitted to the High Court Sandakan for full hearing and parties are at liberty to apply to the court for further directions to comply with the provisions of O. 70 RHC.
5. Deposit lodged in court shall be refunded to the appellants.